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No. 84-1784

In the Supreme Court of the United States

October Term, 1984

JACK GRYNBERG, JACK GRYNBERG AND ASSOCIATES, and CELESTE GRYNBERG,

Petitioners,

v.

PAUL DANZIG, LOUIS DEGEN, ROBERT RUSSELL, and CARL ZWERNER,

Respondents.

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE CALIFORNIA COURT OF APPEAL, FIRST APPELLATE DISTRICT

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Petitioners Jack Grynberg, Jack Grynberg and Associates and Celeste Grynberg (collectively the "Grynbergs") reply as follows to Respondents' "Opposition to Petition for Writ of Certiorari to the California Court of Appeal, First Appellate District" (the "Opposition").[1]

I. CALIFORNIA DID NOT AFFORD THE DUE PROCESS PROTECTION TO ABSENT PLAINTIFF CLASS MEMBERS WHICH THIS COURT MANDATED IN *PHILLIPS PETROLEUM CO.* v. *SHUTTS.*

In *Phillips Petroleum Co.* v. *Shutts*, ___ U.S. ___, 105 S.Ct. 2965, 2971-72 (1985), this Court declared that a defendant in a multistate class action seeking a money judgment has standing to challenge the forum state's jurisdiction over absent class members because the defendant would be obviously and immediately injured if the class-action judgment became final without also binding the plaintiff class. Like Phillips Petroleum Company, the Grynbergs raised and have standing to raise class notice and related due process issues in this Court.

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1. Terms defined in the Petition, *e.g.*, the "1979 Rescission Claim," are used in this Reply without change in meaning.

In the words of the Court of Appeal, this case involves a "failure to provide notice to the class of an amendment to the complaint seeking the different *remedy* of rescission [emphasis in original]." Petition, page A8, n. 5. California's failure to afford absent *Danzig* class members an opportunity to opt out of class prosecution of the claim asserted by that amendment is beyond cavil. The Opposition raises important questions as to whether the constitutional conditions precedent to state-court jurisdiction in multistate class actions may be avoided, to the detriment of absent class members and class-action defendants, by invoking state doctrines requiring such defendants to assure compliance with jurisdictional due process prerequisites or permitting such defendants to waive fundamental rights of the absent class members which this Court recognized in *Phillips*.[2]

In *Phillips*, this Court held that state jurisdiction over claims of absent class-action plaintiffs is, under the Fourteenth Amendment, dependent upon the forum state's furnishing procedural due process protection to the absent plaintiffs. Such protection requires that (1) absent plaintiffs receive the best practicable notice of pendency of the action, which "should describe the action and the plaintiffs' rights in it" and afford them an opportunity to present their objections; and (2) each absent plaintiff be accorded an opportunity "to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court." 105 S.Ct. at 2975.

Under the standards of *Phillips*, the absent *Danzig* class members were denied due process. The trial court below entered its class-action judgment upon the 1979 Rescission Claim *without any notice* to absent class members of that

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2. This Court decided *Phillips* on June 26, 1985, after the filing of the Petition and the Opposition on May 14 and June 13, 1985, respectively. In light of *Phillips*, the Grynbergs no longer argue that state-court jurisdiction over absent class members is subject to a minimum contacts requirement.

claim until *after* the judgment.[3] The 1979 Rescission Claim sought rescission of the *original* GGRB partnership agreement *ab initio;* claims described in the 1976 notice sought to affirm and enforce that agreement. In contrast to the "fully descriptive" notice in *Phillips, see* 105 S.Ct. at 2969 and 2976, the 1976 notice in *Danzig* does not even mention the relief sought by the 1979 Rescission Claim. The 1976 notice gives absent class members notice only of other claims, upon which no judgment was entered. *See* Petition, pages A47 and A52. Moreover, absent class members were afforded *no* opportunity to opt out of class treatment of the 1979 Rescission Claim. The 1976 notice expressly denies an opportunity to opt out of class prosecution of all but two of the original claims, neither of which is here relevant.

Assuming *arguendo* complete adequacy of the 1976 notice with respect to all claims theretofore asserted, on no conceivable basis did the 1976 notice provide, consistently with *Phillips*, procedural due process protection to absent class members in respect to the 1979 Rescission Claim.

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3. The Court of Appeal expressly addresses "the failure to provide notice to the class of the amendment seeking the different *remedy* of rescission [emphasis in original]" but casually concludes that this failure involved "no prejudice to Grynberg" and that any error "was clearly harmless." Petition, p. A8, n. 5. The Court of Appeal's explanation is that, since the "plaintiff class received adequate notice of the original complaint alleging the same ultimate factual averments underlying the rescission theory of relief, separate lawsuits by individual members could not be successfully maintained." *Id.* The 1976 class notice (*see* Petition, pp. A47-A49) does not give notice of either facts tending to show or any claim of fraud in the inducement of the original GGRB partnership agreement. The notice explicitly delineates possible judgments based on an affirmation of the agreement which would bind the class; the only reference in the notice to rescission is expressly limited to rescission of an *amendment* two years after the original agreement. *Id.* at pp. A49-50. The Court of Appeal's conclusion that "separate lawsuits by individual class members could not be successfully maintained" is simply contrary to the clear teaching of *Phillips* that, without providing absent plaintiff class members with notice and an opportunity to be excluded, any judgment in favor of such absent plaintiffs is not entitled to *res judicata* effect. *Phillips, supra*, 105 S.Ct. at 2971-72.

II. CONSISTENTLY WITH *PHILLIPS*, THE GRYNBERGS COULD NOT AND DID NOT WAIVE DUE PROCESS RIGHTS OF ABSENT *DANZIG* CLASS MEMBERS.

The Opposition's contention (*see* pages 9-10, 19-21) that the Grynbergs waived the absence of any notice of the 1979 Rescission Claim, by failing timely to raise an appropriate notice issue, assumes that the Grynbergs had legal power to waive rights personal to absent class members. As Respondents concede (Opposition at pages 10, 22-23), the pertinent fundamental rights are due process rights of the absent class members, not of the Grynbergs. Any contention that the Grynbergs waived rights of the absent *Danzig* class members is unsupported by the record or any precedent.[4] Absent actual authority, one person cannot waive fundamental constitutional rights of another.

As this Court stated in *Phillips*, jurisdiction over absent plaintiffs is not like personal jurisdiction over a defendant, which may be forever waived by a defendant who raises no

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4. The California waiver cases relied upon by Respondents, cited at page 20 of the Opposition, are readily distinguishable. *Green* v. *Obledo*, 29 Cal.3d 126, 172 Cal. Rptr. 206, 624 P.2d 256 (1981), raised no issue of absence of jurisdiction over absent class members for lack of due process under the Fourteenth Amendment and instead involved propriety of a decertification order after a decision on the merits. *Civil Service Employees Ins. Co.* v. *Superior Court of San Francisco*, 22 Cal.3d 362, 149 Cal. Rptr. 360, 584 P.2d 497 (1978), involved waiver of a constitutional challenge to a partial summary judgment order rejecting affirmative *defenses*, which a class-action defendant opposed unsuccessfully on the merits prior to notice to absent class members of pendency of the class action. Rejecting defenses of a class-action defendant without notice to absent class members lacks jurisdictional significance, for rights of the absent members are not impaired by the rejection and, if anything, are enhanced. Imposing waiver requirements upon class-action defendants before the forum has attempted to exercise jurisdiction over absent class members in no way impairs rights of prospective absent plaintiffs. To the extent, if any, that *Civil Service Employees Ins. Co.* v. *Superior Court* or other California authority permit a class-action defendant to waive due process rights of absent class members, such decisions are contrary to *Phillips*.

objection. 105 S.Ct. at 2974-75. *Cf. Insurance Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694 (1982). Jurisdiction over absent class members does not require *any* action by either absent plaintiffs or a class-action defendant; it rather presupposes that the forum state has afforded procedural due process to the absent plaintiffs. *See* 105 S.Ct. at 2974.

The Opposition implies (*see* pages 9-10) that the Grynbergs, not Respondents as class representatives, had responsibility to assure that absent class members received adequate notice and a meaningful opportunity to opt out of class treatment of the 1979 Rescission Claim. A class-action defendant should not be required to assume the fiduciary responsibilities of plaintiff class representatives. As this Court noted in *Phillips*, a class-action plaintiff need not fend for himself; "*the court and named plaintiffs protect his interests* [emphasis added]".[5] Consistently with *Phillips*, California may not invoke waiver principles to shift Respondents' responsibilities as class representatives to the Grynbergs, the class-action defendants. The conceded failure of the California courts to afford adequate notice or meaningful opportunity to opt out of class prosecution of the 1979 Rescission Claim should be reviewed by this Court.

III. RESPONDENTS' CONTENTIONS THAT ABSENT CLASS MEMBERS CONSENTED TO OR RATIFIED JURISDICTION OF THE CALIFORNIA COURTS PRESENT ISSUES FOR REVIEW BY THIS COURT IN LIGHT OF *PHILLIPS*.

Respondents contend (Opposition, pages 13-15) that absent class members voluntarily acceded to the jurisdiction of the California courts by answering certain interrogatories,

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5. 105 S.Ct. at 2974. This Court consistently has placed responsibility for proper class certification or recertification and notice upon class representatives. *See e.g., East Texas Motor Freight System, Inc.* v. *Rodriguez*, 431 U.S. 395 (1977); *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156 (1974).

which were limited to definition of unnamed class members, certain reliance issues and dilution of partnership interests. *See Danzig* v. *Superior Court for Alameda County*, 87 Cal. App.3d 604, 607, 151 Cal. Rptr. 185, 187 (1978). Neither the interrogatories nor the answers thereto are in the record on appeal; the Court of Appeal considered neither upon the appeal from the trial court's judgment. Respondents fail to disclose that those interrogatories, answers to which were *compelled* by order of the trial court, were propounded and answered in respect to the original 1975 complaint, *not* the 1979 Rescission Claim. Respondents also fail to disclose that, upon the prior appeal, the Court of Appeal, recognizing that unnamed class members may be simply "persons" and not "parties," expressly refused to hold "that unnamed class members stand on the same footing as named parties to whom interrogatories have been propounded." *Danzig* v. *Superior Court for Alameda County, supra*, 87 Cal. App.3d at 610-12, 151 Cal. Rptr. at 189-90. Such limited discovery procedures provided neither notice of the 1979 Rescission Claim nor the opportunity to be excluded from its class prosecution, the constitutional predicates, under *Phillips*, to state-court jurisdiction over absent plaintiff class members. *Phillips, supra*, 105 S.Ct. at 2975.

Respondents belatedly assert that, under California law, each absent class member who answered interrogatories made a general appearance. Opposition, page 13.[6] Any contention that these absent plaintiffs became parties is absolutely belied by the trial court's continuous treatment of this action as a class action, the trial court's class-action findings

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6. Both *Chitwood* v. *County of Los Angeles*, 14 Cal. App. 3d 522, 92 Cal.Rptr. 441 (1971) and *Chicago Life Ins. Co.* v. *Cherry*, 244 U.S. 25 (1917), cited in the Opposition (p. 13) in support of Respondents' general appearance argument, establish standards for voluntary submission to state-court jurisdiction by a defendant, not by an absent class-action plaintiff. As this Court held in *Phillips*, standards governing state-court jurisdiction over a defendant do not equally apply to a state's assertion of jurisdiction over absent plaintiffs. *Phillips, supra*, 105 S.Ct. at 2974-75.

and judgment and their affirmance by the Court of Appeal.[7] Indeed, the Opposition repeatedly refers to the plaintiff *class* and advises this Court that "[t]he action was tried as a class action." Opposition, page 21.

The alleged post-judgment ratification of the class-action judgment by absent class members, which is suggested by Respondents on the basis of numerous non-record and post-judgment facts (*see* Opposition, pages 15-16),[8] does not cure constitutional defects; it instead constitutes an unfair "one-way intervention." *See American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538, 547 (1974). Absent class members are free at any time to disavow the alleged ratification, for which there is no consideration. Unilateral acts of a party, like the alleged ratification, do not confer jurisdiction otherwise absent. *See Hanson* v. *Denckla*, 357 U.S. 235, 253 (1958).

IV. THE ACROSS-THE-BOARD APPLICATION OF CALIFORNIA LAW TO CLAIMS AND DEFENSES WITH WHICH CALIFORNIA HAS NO CONNECTION IS REVIEWABLE BY THIS COURT.

The Petition points out significant differences among California's law and the laws of other states having substantial interests and contacts affiliating them with non-California *Danzig* class members, their claims and defenses thereto.

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7. After the interrogatories had been answered, the trial court expressly found that "[t]he within action is a proper class action on behalf of the plaintiffs; the plaintiff class constitutes a proper and appropriate class." Petition, p. A36. The Court of Appeal later referred to the judgment against the Grynbergs as being "in favor of plaintiffs individually and as class representatives of all limited partner investors." Petition, p. A2.

8. Non-record facts relied upon in the Opposition include references to bankruptcy proceedings and claims filed by class members therein (*see* pp. 8, 10-11, 15, 25), without disclosure that the Court of Appeal denied Respondents' motion to supplement the record below with materials filed in such proceedings; and a failure to file an appeal bond (*see* p. 8), without disclosure that cash sufficient to discharge any proper liability of the Grynbergs to *Danzig* class members has been deposited with the Clerk of the United States Bankruptcy Court for the District of Colorado pending final allowance of disallowance of their claims.

See Petition, pages 14-16. The Opposition does not address the basic issue: can California constitutionally apply its law to every claim and defense in *Danzig* irrespective of the absence of any affiliation of California with those claims and defenses.

The Petition relies upon *Allstate Insurance Co.* v. *Hague*, 449 U.S. 302, 308-11 (1981), in contending that California should not be permitted in blanket fashion to apply its law to nonresidents, claims and defenses with which California has no contacts. Petition, page 14. This Court reaffirmed the *Allstate* standard in *Phillips*. 105 S.Ct. at 2980. The Opposition does not mention *Allstate* or dispute that, as to nonresident class members, California did not have contacts satisfying the *Allstate* mandate. The Opposition instead contends that the Court of Appeal "held" that the Grynbergs waived any claim "that the law of the states of residents of the class members was applicable to their respective claims by failing to assert such claim before proceeding to trial and judgment."[9] Opposition, p. 16.

Contrary to Respondents' contention, the Gynbergs adequately raised choice-of-law issues before the trial court. In their reply to Respondents' "Opening Trial Brief on Choice of Law Issue," the Grynbergs called attention to the varying standards of common law fraud and fiduciary duty among California, Colorado and Florida; noted the severe impairment of an interstate offering of limited partnership interests resulting from uniform application of California law to the

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9. Respondents' waiver contention is based principally upon *Hurtado* v. *Superior Court of Sacramento County*, 11 Cal. 3d 574, 581, 114 Cal. Rptr. 106, 110, 522 P.2d 666 (1974), holding that the forum will apply its own rule of decision unless a litigant "timely" invokes the law of a foreign state and demonstrates that "the latter rule of decision will further the interest of the foreign state and . . . is an appropriate one for the forum to apply . . . " In *Phillips*, this Court rejected as "not . . . consistent with the decisions of this Court" a substantially identical Kansas choice-of-law-standard, requiring application of forum law in the absence of a compelling reason for applying a different law, and held that the constitutional limitations laid down in *Allstate* and *Home Insurance Co.* v. *Dick*, 281 U.S. 397, 408 (1930), "must be respected even in a nation-wide class action." 105 S.Ct. at 2981.

entire offering; and contended that any application of California law as to punitive damages should be limited to class members who were California residents because a uniform application would provide to other class members, especially the six Colorado residents, benefits to which they clearly were not entitled.[10] In objecting to the trial court's proposed findings and conclusions (prior to this Court's decision in *Allstate*), the Grynbergs specifically argued the patent unfairness of *ex post facto* application, eight years later, of California law to transactions between a Colorado offeror and, for example, a Florida offeree.

The trial court expressly addressed and decided the choice of law issues, concluding that California law should be applied to the entire action and that no other state has a strong governmental interest that would be impaired by such application. *See* Petition, page A39, Conclusions of Law Nos. 25-27. In affirming the trial court's judgment, the Court of Appeal denied on the merits, without opinion and without finding any such waiver, the Grynbergs' motion to the Court of Appeal to dismiss a portion of the *Danzig* judgment because of such and other infirmities.[11] *See* Petition, p. A18.

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10. Respondents' "Opening Trial Brief on Choice of Law Issue" admitted significant conflicts between the laws of California and Colorado with respect to the availability of punitive damages and whether the plaintiffs' affirmance of the GGRB partnership agreement precluded their subsequent rescission claim. *Compare Aaberg* v. *H. A. Harmon Co.*, 144 Colo. 579, 358 P.2d 601 (1960), *and Wheeler* v. *Wilkin*, 98 Colo. 568, 58 P.2d 1223 (1936), *with Miller* v. *National American Life Ins. Co.*, 54 Cal.App. 3d 331, 126 Cal.Rptr. 731 (1976) (availability of punitive damages); *compare Aaberg* v. *H. A. Harmon, supra, and Cole* v. *Smith*, 26 Colo. 506, 58 P. 1086 (1889), *with Williams* v. *Marshall*, 37 Cal.2d 445, 235 P.2d 372 (1951) (election of remedies).

11. The Court of Appeal's sole reference to choice of law relates, not to the Gynbergs' constitutional choice of law argument, but to their challenge to the trial court's class certification as not being founded upon common questions of law or fact. *See* Petition, page A8, n.5. The Court of Appeal did not hold that the Grynbergs waived their right to assert the constitutional infirmities of a wholesale application of California law. The Court of Appeal's premise, that "such theory is urged for the first time on appeal," is plainly incorrect. *See* text beginning at p.8, *supra*.

Since the California courts "actually considered and decided" choice-of-law issues in respect to the laws of all states here pertinent, inquiries as to when the issues were raised are irrelevant; such issues have been preserved for review by this Court. *Manhattan Life Ins. Co.* v. *Cohen*, 234 U.S. 123, 134 (1914); *accord, Orr* v. *Orr*, 440 U.S. 268, 274-75 (1979). *See also Braniff Airways, Inc.* v. *Nebraska State Board of Equalization & Assessment*, 347 U.S. 590, 599 (1974).

Just as this Court in *Phillips* did not permit Kansas to apply its law in order to satisfy a Kansas common-question requirement, this Court should not permit California to nullify constitutional limitations on choice of law in order to satisfy California's procedural requirements. *See* 105 S.Ct. at 2980. The application of California law in this case to all claims, transactions and defenses having no relationship to California plainly disregards the constitutional limitations on choice of substantive law mandated by *Allstate* and *Phillips* and merits this Court's review.

CONCLUSION

For all reasons stated in the Petition and herein, the Grynbergs' Petition for a Writ of Certiorari should be granted.

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